Supreme Court, U.S.
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No. 94-58

In the
Supreme Court of the United States
October Term, 1994

General Electric Capital Corporation
and AVEMCO Insurance Company,

Petitioners,

vs.

National Union Fire Insurance Company
of Pittsburgh, Pa.,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief in Opposition

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QUESTION PRESENTED

The question presented for review is whether the court of appeals misapplied Texas law and misinterpreted the terms of an insurance policy as a result.

As is explained more fully below, the issue is not whether the court of appeals failed to comply with the *Erie* doctrine. The petitioners' complaint is not that the court of appeals failed to apply Texas substantive law in this diversity case, but that the court did apply Texas law and did it badly.

LIST OF PARTIES

The following is a list of all of the parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed:

Appellants:
General Electric Capital Corporation
AVEMCO Insurance Company

Appellee:
National Union Fire Insurance Company
of Pittsburgh, Pa.

Pursuant to Supreme Court Rule 29.1, the following is a list of parent companies and subsidiaries of National Union Fire Insurance Company of Pittsburgh, Pa.:

American International Group, Inc.

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TO THE UNITED STATES SUPREME COURT:

Pursuant to rule 15.2 of the Supreme Court Rules, respondent National Union Fire Insurance Company of Pittsburgh, Pa., files this brief in opposition to the petition for writ of certiorari and asks that this court deny the petition.

OPINIONS AND JUDGMENTS BELOW

The opinions and judgments delivered in the courts below are as follows:

National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc., 18 F.3d 323 (5th Cir. 1994)

National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc., No. 3-91-1187-H (N.D. Tex. Feb. 16, 1993) (judgment)

National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc., No. 3-91-1187-H (N.D. Tex. Jan. 20, 1993) (opinion)

National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc., No. 3-91-1187-H (N.D. Tex. Nov. 3, 1992) (opinion)

JURISDICTION

National Union does not contest the facts alleged in the petitioners' statement of jurisdiction, except that the court of appeals' judgment was *entered* on April 12, 1994.

STATEMENT OF THE CASE

Pursuant to rule 24.2, National Union will not offer a separate statement of the case except to supplement that of the petitioners by reference to the facts as set forth in the court of appeals' opinion.

SUMMARY OF THE ARGUMENT

Although they purport to seek review based on the court of appeals' alleged refusal to apply state law under the *Erie* doctrine, the petition actually seeks nothing more than review of the court of appeals' interpretation of an insurance policy — a decision based solely on substantive law of Texas.

The court of appeals and district court both applied Texas law to this dispute. They did not purport to apply federal common law or the law of some other state. Thus, the petitioners' real complaint is not that the courts failed to apply state law pursuant to the *Erie* doctrine, but that the courts did not apply that law correctly. A complaint that the lower courts erred in their application of state law is not a proper subject for a petition for writ of certiorari to this court.

National Union contends, of course, that the lower courts applied Texas law correctly. They decided that the sublease of the aircraft by Care Flight, the named insured, constituted a conversion; that a conversion by the named insured was not covered by the policy; and that the policy's war risk endorsement did not resurrect coverage that had already terminated under the policy.

In addition, the court of appeals properly decided that the summary judgment evidence conclusively showed that a conversion had occurred, precluding coverage under the policy. The petitioners waived any claim that there was a genuine issue of fact regarding conversion which precluded summary judgment.

ARGUMENT

I. The court of appeals did not decline to apply the applicable state law.

The crux of the petitioners' complaint is the claim that the court of appeals did not apply applicable Texas law regarding the interpretation of insurance policies. In particular, the petitioners have emphasized the rule that "if a contract of insurance is susceptible of more than one reasonable interpretation, [the courts] must resolve the uncertainty by adopting the construction that most favors the insured." *National Union Fire Insurance Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

The petitioners argue that the court failed to apply this rule of construction. Petition at 30. They contend that the interpretation of the policy they proposed was as reasonable as the one National Union proposed; that the resulting conflict in interpretations showed that the policy was ambiguous; and that the court improperly declined to adopt the petitioners' interpretation, adopting instead the interpretation National Union proposed, simply because the court thought that interpretation was more reasonable. Petition at 11, 14-15.

A review of the court of appeals' opinion shows that the reason the court did not adopt the interpretation petitioners proposed was not because that interpretation was the lesser of two reasonable ones, but because it was not reasonable to begin with. The court determined that the policy was not ambiguous, that only one reasonable interpretation was possible, and that as a result the court had no basis for applying the above rule of construction.

The court's ruling complied with Texas law. The question of whether the policy was ambiguous was a legal determination the court could make under Texas law. *See National Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196 (5th Cir. 1990); *Praeger v. Wilson*, 721 S.W.2d 529 (Tex. App. — Fort Worth 1986, writ ref'd n.r.e.). The policy's meaning, including the reasonableness of an interpretation, is also a question of contract construction which the court decides. *Forbau v. Aetna Life Ins. Co.*, 36 Tex. Sup. Ct. J. 140 (Nov. 4, 1992).

The court of appeals determined that the insurance policy was susceptible of only one reasonable construction. Specifically, the court decided that the policy did not cover loss arising from conversion by the insured, and the court decided that the war risk endorsement did not conflict with this conversion exclusion. Thus, the court held that once Care Flight converted the aircraft, the policy's coverage ceased, and a subsequent confiscation of the aircraft by a foreign government did not resurrect coverage under the policy's separate war risk endorsement. 18 F.3d at 329.

The court decided that the petitioners' proposed interpretation of the policy "ignores the last sentence of the war risk endorsement, which states that nothing in the endorsement shall "vary, alter, waive or extend" the terms of the policy except as stated in the endorsement. *Id.* The court said that the interpretation the petitioners had made "would make the conversion exclusion to the breach of warranty endorsement meaningless." *Id.* The court's conclusion that the petitioners' interpretation was not a reasonable one — a decision that Texas law permits the courts to make — preempted the application of the rule which the petitioners claim the court ignored.

Although the court of appeals did not cite to the *National Union Fire Ins. Co. v. Hudson Energy Co.* opinion, that failure does not mean the court did not apply the law it was supposed to apply. When the court cited *Forbau v. Aetna Life Ins. Co.*, 36 Tex. Sup. Ct. J. 140, which states the applicable rule of construction and also cites *Hudson Energy*, the court made clear that it was indeed following applicable Texas precedent. *See id.* at 144-45. Therefore, petitioners have no basis for claiming that the court of appeals ignored applicable Texas law. Instead, the court did not apply the particular rule of construction at issue simply because the rule was inapplicable once the court had determined that the policy was susceptible of only one reasonable construction.

II. The court properly determined that the policy had only one reasonable interpretation.

Whether a court of appeals properly applied state rules of contract construction is not an issue which merits this court's sparing use of its power of discretionary review. However, this court should note that the correctness of the court of appeals' decision is evident from the policy itself.

The only reasonable interpretation of the breach of warranty endorsement and the war risk endorsement is that General Electric has coverage as provided in the policy and as expanded by the war risk endorsement, except in the event of a conversion, embezzlement, or secretion by Care Flight. The extended coverage language contained in the war risk endorsement cannot reasonably be construed as "invalidating" language in the policy which precludes coverage in case of a conversion by the insured.

Instead, the only reasonable reading of the war risk endorsement is that it supersedes only two exclusions in the policy: paragraphs 6(d) and 6(e) of the "Exclusions." Paragraph 6(d) provides that "loss or damage arising from capture, seizure, arrest, restraint or detention . . . by any government or governmental authority" is excluded from coverage, and paragraph 6(e) provides that "loss or damage arising from war, invasion, civil war, revolution . . ." is excluded (III R. 25). The language "notwithstanding anything in the policy to the contrary" in the war risk endorsement is a direct reference to paragraphs 6(d) and 6(e), because those are the only two paragraphs that are contrary to the terms of the war risk endorsement.

The language in the war risk endorsement that "[n]othing herein contained shall vary, alter, waive or extend any of the terms . . . of the policy other than as stated above" serves to reinforce this construction. That language means that other provisions of the policy are not invalidated by the war risk endorsement.

Close attention to the language of the policy shows that no ambiguity exists. Giving effect to all the language of the policy, including that in the war risk endorsement that "[n]othing herein contained shall vary, alter, waive or extend any of the terms . . . of the policy other than as stated above," removes the imagined conflict between that endorsement and the conversion exclusion in the policy.

For these reasons, the court of appeals' decision that the National Union policy was susceptible of only one reasonable construction was correct.

III. The petitioners waived any argument that an issue of fact precluded summary judgment.

The petitioners assert that the court of appeals did not apply the appropriate standard in ruling on petitioners' contention that a genuine issue of material fact precluded summary judgment. Petition at 11. Specifically, they say that there was a genuine issue of fact as to whether the sublease by Care Flight was a "serious" interference with General Electric's rights, thereby constituting a conversion. Petition at 13. The petitioners waived any complaint that an issue of fact existed on this point, because in the district court the petitioners did not raise this issue in response to National Union's motion for summary judgment.

An argument that a genuine issue of fact precludes summary judgment is waived if not raised in the district court. *See, e.g., Zim Israel Navigation Co. v. Special Carriers, Inc.*, 800 F.2d 1392, 1394 (5th Cir. 1986); *Volkswagen of America, Inc. v. Robertson*, 713 F.2d 1151, 1162 (5th Cir. 1983). A party may not argue on appeal for reversal of summary judgment based on legal theories they did not present to the district court. *See, e.g., Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985); *John v. State of Louisiana (Bd. of Trustees for State Colleges and Univ.)*, 757 F.2d 698, 710-11 (5th Cir. 1985). Arguments not specifically brought to the attention of the district court cannot be grounds for reversal of a summary judgment on appeal. *See Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & nn.7-8 (5th Cir.), *cert. denied*, 113 S. Ct. 98 (1992).

In the court of appeals, the petitioners argued that an issue of fact existed regarding six factors listed in the Restatement (Second) of Torts section defining conversion.

Brief of Appellants at 28-35. In the district court, they did not argue that an issue of fact existed as to these six factors (II R. 243-76, 291-301, 355-78, 396-408). In fact, not until after the initial summary judgment decision did the petitioners argue that any fact dispute existed on any facts.

Nevertheless, there is no basis for concluding that a genuine issue of material fact exists as to the seriousness of Care Flight's interference with the petitioners' dominion and control of the aircraft. The court of appeals' opinion shows that the court properly decided that the summary judgment evidence conclusively established a conversion of the aircraft under Texas law.

CONCLUSION

The petitioners present no question which merits a review by this court. For these reasons, this court should deny the petition for writ of certiorari.

Respectfully submitted,

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